

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)	
)	MM Docket No. <u>00-10</u>
Establishment of a Class A)	MM Docket No. 99-292
Television Service)	RM - 9260

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

COMMENTS OF TV 31, L.L.C.

Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, TV 31, L.L.C. ("TV 31"), permittee of UHF TV Station KBCA, Channel 31 at Elk City, Oklahoma, by its counsel, hereby submits the following comments in the above-captioned proceeding. In the *Notice of Proposed Rule Making* in this proceeding,¹ the Commission sought comment on various proposed new rules to implement the Community Broadcasters Protection Act of 1999 ("CBPA"), codified at 47 U.S.C. § 336(f). TV 31 endorses the Commission's tentative conclusion that Section (f)(7)(A) of the CBPA requires Class A LPTV stations to protect allotment proposals for technical changes in authorized facilities so long as the application or proposal in question was filed with the Commission prior to November 29, 1999, the date of enactment of the CBPA. In support thereof, TV 31 hereby submits the following:

STATEMENT OF INTEREST

1. TV 31 is presently the permittee of UHF TV Station KBCA, Channel 31 at Elk City, Oklahoma. On March 24, 1999, TV 31 filed a Petition for Rule Making with the Commission,

1. In the Matter of Establishment of a Class A Television Service, *Order and Notice of Proposed Rule Making*, 15 FCC Rcd. ____ (FCC 00-16, rel. January 13, 2000) ("Notice").

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seeking to amend the Commission's Table of NTSC Television Allotments, 47 C.F.R. § 73.606(b), to delete Channel 31 from Elk City, Oklahoma, allot Channel 31 to Borger, Texas instead, and modify TV 31's permit for Station KBCA to reflect this reallocation. Grant of this petition would provide Borger, Texas with its first local television service, and would leave Elk City, Oklahoma with a noncommercial educational television allotment (Channel *15). In its petition, TV 31 provided considerable evidence that its proposed reallocation would result in substantial public interest benefits. To date, the Commission has not acted on TV 31's Petition for Rule Making. Generally, the Mass Media Bureau issues a Notice of Proposed Rule Making within a few months from the filing date, but no such action has occurred yet.

2. Despite the public interest benefits that the reallocation requested by TV 31 would bring, the proposal will be thwarted if the Commission grants the Class A status requested by LPTV Station K31ET, Amarillo, Texas (the "K31ET Upgrade"). Under the Commission's proposed rules, grant of the K31ET Upgrade would preclude the allotment of a first local television service to Borger, Texas. On the other hand, Amarillo has five local television services (KACV-TV, Ch. 2; KAMR-TV, Ch. 4; KVII-TV, Ch. 7; KFAA-TV, Ch. 10; and KCIT(TV), Ch. 14). However, the Commission will not be permitted to make a Section 307(b) determination as to the needs of Borger, Texas for a first local television service if the Commission decides that the CBPA favors the Class A status of K31ET despite TV 31's prior filing of a rule making petition.

DISCUSSION

3. Section (f)(7)(A) of the CBPA prohibits the grant of a Class A license where the station would cause "interference within the predicted Grade B contour (as of the date of enactment of the . . . [CBPA] . . . or as proposed in a change application filed on or before such date) of any

television station transmitting in analog format.”² The Commission proposes to interpret the phrase “transmitting in analog format” to mean “both stations that are actually transmitting in analog format and those which have been authorized to construct facilities capable of transmitting in analog format (*i.e.*, construction permits).”³ The *Notice* then further explains that “[u]nder this interpretation, pending applications for new NTSC full power stations would not be protected, nor would allotment proposals for such facilities, modified allotment proposals for channel or other technical changes, or the facilities in modification applications filed after November 29, 1999.”⁴ Thus, the Commission seems to be interpreting the statute to protect allotment proposals filed before November 29, 1999, such as that of TV 31. The Commission seeks comment on its proposed interpretation.

4. TV 31 strongly endorses the Commission’s proposed reading of Section (f)(7)(A) of the CBPA. As a general matter, requiring Class A stations to protect applications or proposals pending as of the date the CBPA was passed would rightly protect the expectations of those parties filing such applications or proposals. These parties made their submissions to the Commission in good faith compliance with the Commission’s rules at the time they were filed. Any new protection limitations imposed by the CBPA or by the Commission’s interpretation of the statute should not be applied in a retroactive manner as to prior filed proposals without a clear and unequivocal pronouncement that Congress intended retroactive treatment. The injustice caused by the retroactive application of administrative rules in this instance would not be outweighed by any benefit that might result from interpreting the statute to the contrary.

2. *Notice* at ¶ 27, *quoting* 47 U.S.C. § 336(f)(7)(A)(i).

3. *Id.*

4. *Id.*

5. In TV 31's specific case, the Commission's proposed interpretation of Section (f)(7)(A) would work to prevent an injustice. As explained above, TV 31 submitted its Petition for Rule Making nearly eleven months ago. TV 31 had every intention of obtaining a construction permit and beginning construction at Borger, Texas as soon as the Commission acted on its request. Administrative inaction has delayed the service that TV 31 intended. As such, the Commission is right to interpret Section (f)(7)(A) of the CBPA not to penalize TV 31 and others similarly situated for delays in application processing or consideration of rule making petitions that occurred through no fault of the applicant or petitioner.

6. Finally, not only would the Commission's interpretation prevent an unjust result for TV 31, it would also promote the public interest goals of Section 307(b). The Commission's interpretation would result in the provision of a first local service to Borger, Texas, whereas Amarillo, Texas already has five local television services. Such a result comports more closely with Section 307(b)'s mandate that the Commission "provide a fair, efficient, and *equitable* distribution of radio service [among the several States and communities]."⁵

CONCLUSION

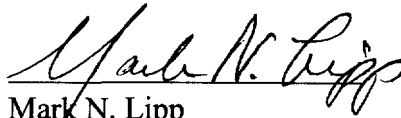
7. In light of the foregoing, TV 31 hereby endorses the Commission's interpretation of Section (f)(7)(A) of the CBPA to require the protection of allotment proposals filed with the Commission prior to November 29, 1999. TV 31 believes that such an interpretation rightly protects the reasonable expectation of parties filing such applications and proposals, and in TV 31's case,

5. 47 U.S.C. § 307(b) (emphasis added).

prevents injustice caused by the Commission's failure to act on TV 31's reallocation proposal in a timely fashion.

Respectfully submitted,

TV 31, L.L.C.

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February 10, 2000